

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

NORMA RAMIREZ, a married woman,)	NO. 62166-1-I
)	
Appellant,)	DIVISION ONE
)	
v.)	
)	
WHATCOM COUNSELING AND)	UNPUBLISHED OPINION
PSYCHIATRIC CLINIC, a Washington)	
corporation; RICK SUCEE and JANE)	
DOE SUCEE, husband and wife,)	
and the marital community composed)	
thereof,)	
)	
Respondents.)	FILED: July 13, 2009
)	

Leach, J. — Norma Ramirez appeals the trial court’s summary judgment order dismissing her claims against Whatcom Counseling and Psychiatric Clinic (WCPC) for discrimination based on race, gender, and age under the Washington Law Against Discrimination (WLAD), chapter 49.60 RCW, negligent misrepresentation, and breach of contract.¹ Because Ramirez made the requisite prima facie showing of discrimination and WCPC failed to produce

¹ Ramirez also named Rick Sucee, the interim chief executive officer (CEO) of the clinic when the events at issue occurred, and his wife in the complaint. For convenience, this analysis refers to all defendants collectively as “WCPC.”

evidence that it terminated Ramirez for a legitimate, nondiscriminatory reason, the trial court erred in dismissing Ramirez's discrimination claims. Ramirez's negligent misrepresentation claim also survives since Ramirez raised a genuine issue of material fact as to whether WCPC affirmatively misrepresented workplace conditions in recruiting her. But Ramirez's breach of contract claim was properly dismissed because she fails to show that WCPC modified the at-will employment relationship. Accordingly, we reverse and remand to the trial court for further proceedings consistent with this opinion.

Background

Ramirez, a Hispanic, Jewish, Native American woman in her fifties, applied for a supervisory position at WCPC in response to an advertisement listed in the January 9, 2000, issue of the Seattle Times. At that time, Ramirez worked in Denver, Colorado, as a program manager supervising a mental health clinic with 14 mental health counselors. She sought the position at WCPC because she wanted to be closer to her family.

In early 2000, Bill Kenney, the head of human resources and recruiter for the clinic, contacted Ramirez from Bellingham, Washington, about hiring her as the clinical director. Over the course of several conversations, Ramirez asked Kenney specific questions and expressed some of her concerns about leaving her job in Denver. Given her previous experiences working in discriminatory and

abusive work environments, Ramirez made clear that she was happy with her job in Denver and that she was reluctant to relocate unless the working conditions in Bellingham were similar. In response, Kenney stated that Ramirez would receive equal and fair treatment, that the CEO of WCPC, Jane Relin, worked well with everyone, and that Ramirez would “love Bellingham . . . [and] working at Whatcom Counseling.” Ramirez also specifically asked Kenney how management was functioning. Kenney responded that there had been a change in management in the last few years and that after the change, WCPC was “a great team” and that “we all get along.” Ramirez further told Kenney, “It’s a big step for me to leave my job in Denver” and asked, “What do I have to guarantee that I will have a job in Bellingham?” Kenney replied, “An employee is an employee is an employee and we will treat you with all fairness.” In addition to speaking with Kenney, Ramirez spoke with a panel of three or four people before interviewing with WCPC. Ramirez was interviewed by Kenney, Relin, and the outgoing clinical director, Paul Vanderberg.

Ramirez was offered the job and began her employment at WCPC on July 31, 2000. She was given WCPC Policy Statement No. A-1 and Employment Agreement By and Between WCPC and District 1199 Northwest, Hospital and Health Care Employees Union, SEIU AFL-CIO. This agreement contained the following language: “No employee shall be discharged except for just cause.

The parties recognize that, generally, just cause required progressive discipline (generally: verbal warnings, which may be documented, written warnings – which may include work performance improvement plans for poor work performance, suspension without pay, or discharge).” It is undisputed that Ramirez was never a party to the agreement.

Ramirez soon discovered significant problems at WCPC, including poor communication between administration and staff which created conflicts between Relin and middle management and poor documentation of client care which resulted in failed state and regional audits. Ramirez worked to correct the audit problems and was successful in improving the audit issues with North Sound Mental Health Association (NSMHA), a major source of funding for the clinic. For example, the audit covering the end of 2003 by NSMHA reported that WCPC received high scores on the completeness of its documentation and performed better than the other six agencies reviewed for the same period. Ramirez received a \$1,000 bonus for her “outstanding” work as a clinical director.

On July 1, 2003, Ramirez refused to carry out an instruction issued by Relin to fire two mental health counselors who had declined Whatcom County Jail’s request for mental health services as required under the contract between NSMHA and WCPC. The actions of these counselors were linked to a fatality. NSMHA instigated an investigation and fined WCPC \$20,000. The six-month

investigation resulted in a corrective action report by Wendy Klamp, NSMHA's quality manager.

Following the publication of this report, Chuck Benjamin, the executive director of NSMHA, threatened to discontinue WCPC's emergency services component of its NSMHA contract. WCPC met with NSMHA and discharged Ramirez, as well as Relin, on or around March 1, 2004. Ramirez was told that she was being terminated because the board decided to change all management. Shortly after her discharge, a mental health publication reported that Ramirez was terminated due to audit findings concerning leadership and management.

On April 22, 2005, Ramirez filed a complaint against WCPC, alleging discrimination based on race, gender, and age in violation of WLAD, negligent misrepresentation, breach of contract, libel, and slander. On May 8, 2008, WCPC filed a motion for summary judgment, supported largely by Ramirez's deposition testimony. After Ramirez responded, WCPC submitted a second declaration on June 17, 2008, with excerpts from Klamp's deposition transcript attached. On August 4, 2008, the court granted WCPC's summary judgment motion.

Ramirez appeals the court's ruling on her discrimination, misrepresentation, and breach of contract claims.

Standard of Review

We review an order of summary judgment de novo, engaging in the same inquiry as the trial court.² Summary judgment is appropriate if the moving party demonstrates the absence of any genuine issue of material fact and that it is entitled to judgment as a matter of law.³ Summary judgment is also proper if reasonable persons could reach only one conclusion.⁴

Discussion

I. WLAD Discrimination Claims

Ramirez contends that the trial court erred in dismissing her discrimination claims under WLAD. In examining these claims, our courts apply the three-part burden of proof test established in McDonnell Douglas Corp. v. Green.⁵ First, the plaintiff has the burden of establishing a prima facie case of discrimination.⁶ Second, if the plaintiff sufficiently establishes a prima facie case, the burden shifts to the defendant to articulate a legitimate,

² Dumont v. City of Seattle, 148 Wn. App. 850, 860-61, 200 P.3d 764, (2009) (citing Sellsted v. Wash. Mut. Sav. Bank, 69 Wn. App. 852, 857, 851 P.2d 716 (1993), overruled on other grounds by Mackay v. Acorn Custom Cabinetry, Inc., 127 Wn.2d 302, 898 P.2d 284 (1995)).

³ Dumont, 148 Wn. App. at 860-61 (citing Sellsted, 69 Wn. App. at 857).

⁴ Dumont, 148 Wn. App. at 861 (citing Korslund v. Dyncorp Tri-Cities Servs., Inc., 156 Wn.2d 168, 177, 125 P.3d 119 (2005)).

⁵ 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973); see Jones v. Kitsap County Sanitary Landfill, Inc., 60 Wn. App. 369, 371, 803 P.2d 841 (1991); Grimwood v. Univ. of Puget Sound, Inc., 110 Wn.2d 355, 363, 753 P.2d 517 (1988).

⁶ McDonnell Douglas, 411 U.S. at 802.

nondiscriminatory reason for its action.⁷ Third, if the defendant satisfies this burden, the plaintiff has the opportunity to show that the legitimate reasons asserted by the defendant are, in fact, pretextual.⁸ Within this framework, if the plaintiff fails to establish a prima facie case or to rebut the defendant's alternative explanation for the adverse action, the defendant is entitled to summary judgment.⁹ The burdens of proof at all three stages are burdens of production, not of persuasion.¹⁰

Here, Ramirez made a prima facie showing of discrimination based on race, gender, and age. To establish a prima facie case of discrimination under any of these factors, Ramirez must show that she (1) belongs to a protected class, (2) was discharged, (3) was doing satisfactory work, and (4) was replaced by someone not in the protected class.¹¹ Ramirez showed that she was a member of a protected class, was discharged, and was doing satisfactory work—an inference that is supported by facts stated in her deposition. Ramirez testified that she never received any negative evaluations and, in fact, received consistently positive evaluations. She pointed to the \$1,000 bonus that she

⁷ McDonnell Douglas, 411 U.S. at 802.

⁸ McDonnell Douglas, 411 U.S. at 804.

⁹ Hill v. BCTI Income Fund-I, 144 Wn.2d 172, 181, 23 P.3d 440 (2001), overruled on other grounds by McClarty v. Totem Elec., 157 Wn.2d 214, 137 P.3d 844 (2006).

¹⁰ Barker v. Advanced Silicon Materials, LLC, 131 Wn. App. 616, 623–24, 128 P.3d 633 (2006).

¹¹ Jones, 60 Wn. App. at 371.

received shortly before her termination for her “outstanding” work as clinical director. Ramirez also received praise from NSMHA, which rated WCPC’s performance as the highest out of six other agencies reviewed for the period of August to December 2003. WCPC, on the other hand, offered no evidence that Ramirez’s performance was deficient. To satisfy the last prong of the prima facie case, Ramirez stated that she was replaced by a white male, Bob Nelson.¹²

Relying on Ramirez’s deposition testimony, WCPC contends that Ramirez failed to establish a prima facie case. But that testimony only reflects that Ramirez did not have direct evidence that WCPC terminated her employment based on her race, gender, or age. It is well established that it is “improper to require [an employee] to produce ‘direct evidence of discriminatory intent,’”¹³ since “‘employers infrequently announce their bad motive orally or in writing.’”¹⁴

¹² Although Ramirez fails to state Nelson’s age, this is not fatal to Ramirez’s age discrimination claim since WCPC sought a replacement with qualifications similar to Ramirez’s, thus demonstrating a continued need for the same services and skills. See Grimwood, 110 Wn.2d at 363 (stating that in an age discrimination claim “the element of replacement by a younger person or a person outside the protected age group is not absolute; rather, the proof required is that the employer ‘sought a replacement with qualifications similar to his own, thus demonstrating a continued need for the same services and skills.’”) (quoting Loeb v. Textron, Inc., 600 F.2d 1003, 1013 (1st Cir. 1979)).

¹³ Hill, 144 Wn.2d at 179 (quoting U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714 n.3, 103 S. Ct. 1478, 75 L. Ed. 2d 403 (1983)).

¹⁴ Hill, 144 Wn.2d at 179 (quoting deLisle v. FMC Corp., 57 Wn. App. 79, 83, 786 P.2d 839 (1990)).

Rather, “[c]ircumstantial, indirect and inferential evidence will suffice to discharge the plaintiff’s burden.”¹⁵ Contrary to WCPC’s contention, Ramirez’s deposition testimony adequately states facts to support a prima facie case of discrimination based on race, gender, and age.

Proceeding to the second step of the McDonnell Douglas framework, WCPC fails to produce competent evidence that it had a legitimate, nondiscriminatory reason for terminating Ramirez. WCPC insists that it met its burden by producing testimony showing that Ramirez understood “her termination to be [WCPC’s] response to NSMHA’s threat to pull funding.” WCPC also points to Ramirez’s statements regarding her belief that Klamp had requested her termination. Evidence of Ramirez’s subjective beliefs and understandings is not evidence of WCPC’s asserted legitimate, nondiscriminatory reason for terminating Ramirez. At oral argument, WCPC further referred to Klamp’s deposition testimony and audit findings regarding Ramirez’s performance as evidence of WCPC’s reason for firing Ramirez. But this evidence amounts to nothing more than speculation by Ramirez and Klamp about WCPC’s reasons for Ramirez’s termination; WCPC did not produce any evidence establishing its own reasons for dismissing Ramirez. Because WCPC failed to meet its burden that it dismissed Ramirez for a legitimate,

¹⁵ Hill, 144 Wn.2d at 180 (alteration in original) (quoting Sellsted, 69 Wn. App. at 860).

nondiscriminatory reason, the trial court erred in dismissing Ramirez's discrimination claims.

II. Negligent Misrepresentation

Ramirez contends that the trial court erred in dismissing her negligent misrepresentation claim. She bases this claim on Kenney's responses to her questions about WCPC management conditions, in which he stated that there had been a recent change in management, and that after this change, WCPC was "a great team" and "we all get along." To establish an action for negligent misrepresentation, a plaintiff must prove by clear, cogent, and convincing evidence:

(1) the defendant supplied information for the guidance of others in their business transactions that was false, (2) the defendant knew or should have known that the information was supplied to guide the plaintiff in his business transactions, (3) the defendant was negligent in obtaining or communicating the false information, (4) the plaintiff relied on the false information, (5) the plaintiff's reliance was reasonable, and (6) the false information proximately caused the plaintiff damages.^[16]

WCPC argues that Ramirez's claim fails as a matter of law because it had no duty to disclose and Kenney did not make any false statements.

Both of these arguments lack merit. First, our courts have stated that an employer may be liable for making negligent misrepresentations in a job offer.¹⁷

¹⁶ Ross v. Kirner, 162 Wn.2d 493, 499, 172 P.3d 701 (2007) (citing Lawyers Title Ins. Corp. v. Baik, 147 Wn.2d 536, 545, 55 P.3d 619 (2002)).

¹⁷ Flower v. T.R.A. Indus., Inc., 127 Wn. App. 13, 33, 111 P.3d

Ramirez asserted that she would not have left her position in Denver had she known about the “very difficult employment conditions” at WCPC. Second, Ramirez testified that when she arrived at WCPC, she discovered that there were ongoing substantial conflicts between Relin and middle management, that WCPC had multiple failed audits, and that WCPC engaged in continuing improper billing practices. WCPC offers no evidence to the contrary. Instead, WCPC relies on Trimble v. Washington State University,¹⁸ in which the court stated, “Merely not discussing the downsides of various terms of employment in employment negotiations will not create a cause of action for negligent misrepresentation.” In that case, Trimble alleged that Washington State University failed to inform him that the period of tenure review was three years, as opposed to six years.¹⁹ The court rejected his argument, noting that the university had only stated that Trimble was “tenurable.”²⁰ Because Trimble does not involve an affirmative misrepresentation, it is distinguishable.

We hold that Ramirez has demonstrated that a genuine issue of material fact exists as to whether WCPC negligently misrepresented management

1192 (2005) (“[A] plaintiff may properly base his claim of negligent misrepresentation on the terms of the defendant-employer's job offer.”) (citing Chapman v. Mktg. Unlimited, Inc., 14 Wn. App. 34, 36, 539 P.2d 107 (1975)).

¹⁸ 140 Wn.2d 88, 98, 993 P.2d 259 (2000). (citing Havens v. C&D Plastics, Inc., 124 Wn.2d 158, 180-81, 876 P.2d 435 (1994)).

¹⁹ Trimble, 140 Wn.2d at 97.

²⁰ Trimble, 140 Wn.2d at 97.

conditions.²¹ The trial court erred in dismissing her negligent misrepresentation claim on summary judgment.

III. Breach of Contract

Ramirez contends that the trial court erred in dismissing her breach of contract claim by holding that WCPC had not modified the at-will employment relationship. In Washington, “[e]mployment relationships . . . generally are terminable at will by either party.”²² But the at-will employment relationship may be modified by “promises of specific treatment in specific situations found in employee manuals or handbooks issued by an employer to his or her employees.”²³ In a claim for specific treatment in specific situations, the employee must prove the following three elements: “(1) that a statement (or statements) in an employee manual or handbook or similar document amounts to a promise of specific treatment in specific situations, (2) that the employee justifiably relied on the promise, and (3) that the promise was breached.”²⁴ Whether these elements are satisfied are questions of fact, but summary judgment is proper if reasonable minds could reach only one conclusion.²⁵

²¹ Whether Ramirez justifiably relied on Kenney’s representations is a question of fact for the jury. See Shah v. Allstate Ins. Co., 130 Wn. App. 74, 84, 121 P.3d 1204 (2005).

²² McClintick v. Timber Prods. Mfrs., Inc., 105 Wn. App. 914, 920, 21 P.3d 328 (2001).

²³ McGuire v. State, 58 Wn. App. 195, 197, 791 P.2d 929 (1990).

²⁴ Korslund, 156 Wn.2d at 184-85.

²⁵ Korslund, 156 Wn.2d at 185.

Ramirez contends that this exception to the employment at-will rule applies. To satisfy the first element of this claim, Ramirez asserts that the policy statement contains promises that the employment agreement's progressive discipline policy would be applied to her, despite the fact that she is not a party to the agreement. Specifically, she refers to the following language in Section III of the statement entitled "Application of the Employment Agreement":

To the extent that the Clinic may enter into any formal Employment Agreement or Working Agreement with employees as a result of their right to collective bargaining, the intent will be to consistently apply such benefits and working conditions to managerial, administrative and clinical staff to the maximum extent possible and in keeping with operational efficiencies and the law. The prevailing principle is that "An employee is an employee."

. . . .

All employees will receive a copy of any Employment Agreements which the Clinic may enter into. The terms of the Agreement shall inform employee orientation and in the delineation and application of benefits and working conditions, except as may be superseded by specific policy.

But in determining whether WCPC made a promise of specific treatment in specific situations, the above language must be read in the context of the policy statement as a whole.²⁶ Section I entitled "Employment" contains the following language: "Except as required by law and to the extent modified by any Employment Agreement or Personnel Policy, all employment at the Clinic is 'at-

²⁶ Clark v. Sears Roebuck & Co., 110 Wn. App. 825, 830-31, 41 P.3d 1230 (2002) (citing Doolittle v. Small Tribes of W. Wash., Inc., 94 Wn. App. 126, 131, 971 P.2d 545 (1999)).

will' and may be terminated by either the employer or the employee.” In light of this statement, the language relied on by Ramirez cannot be construed as a promise to modify the at-will relationship. Rather, the policy as a whole states that WCPC retains discretion in applying the agreement to nonunion employees.

Ramirez argues that the language in the policy statement here is similar to the language in the policy manual in Doolittle v. Small Tribes of Western Washington, Inc.,²⁷ in “creat[ing] an atmosphere of job security and fair treatment with promises of specific treatment in specific situations.” But Doolittle is distinguishable. In that case, the policy manual for Small Tribes of Western Washington (STOWW) provided for a probation period during which new employees could be terminated at will.²⁸ Following the probation period, the manual expressly provided for termination for cause: “Employees shall be assured reasonable job security so long as the requirements of the job are met, the employee’s conduct is acceptable and the work or level of program funding is continued.”²⁹ The manual further stated that “[e]ffort shall be made by all employees of STOWW, Inc., to encourage and maintain satisfactory employee-management relationships in order to achieve high productivity, and establish the highest possible level of employee efficiency and morale.”³⁰ In light of these

²⁷ 94 Wn. App. 126, 131, 134, 971 P.2d 545 (1999).

²⁸ Doolittle, 94 Wn. App. at 131.

²⁹ Doolittle, 94 Wn. App. at 131.

³⁰ Doolittle, 94 Wn. App. at 132 (alteration in original).

provisions, the court held that the policy manual created “an environment in which the employee believes that, whatever the personnel policies and practices . . . [the policies] established and official at any given time, purport to be fair, and are applied consistently and uniformly to each employee.”³¹ WCPC’s policy statement does not contain similar language. Thus, Ramirez’s reliance on Doolittle is misplaced. The trial court properly determined that WCPC made no promise of specific treatment in specific situations.

Ramirez also asserts that another exception to the employment at-will rule applies, namely that her employment status was modified by an implied contract. Ramirez claims that the language in WCPC’s policy manual quoted above, in combination with Kenney’s oral assurances, forms an implied contract that she would be discharged only for cause.

In determining whether an implied contract exists, our courts examine “the alleged ‘understanding’, the intent of the parties, business custom and usage, the nature of the employment, the situation of the parties, and the circumstance of the case to ascertain the terms of the claimed agreement.”³² Here, the record contains no evidence of contractual intent. As stated above, the language in the

³¹ Doolittle, 94 Wn. App. at 137 (alterations in original) (quoting Thompson v. St. Regis Paper Co., 102 Wn.2d 219, 230, 685 P.2d 1081 (1984)).

³² Roberts v. Atl. Richfield Co., 88 Wn.2d 887, 894-95, 568 P.2d 764 (1977) (citing Perry v. Sindermann, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972)).

policy manual only states that WCPC has discretion in applying the agreement to nonunion employees. Kenney's vague statements cannot be construed as a guarantee that the progressive discipline policy would be applied to Ramirez. Thus, Ramirez only had an unexpressed subjective understanding that she would be discharged only for cause, which cannot establish an implied agreement.³³ The trial court properly dismissed Ramirez's breach of contract claim.

IV. Attorney Fees

WCPC requests attorney fees under RAP 18.1, which entitles a party to recover reasonable attorney fees on appeal if (1) applicable law grants the party a right to recover fees and (2) the party devotes a section of its brief to the request. WCPC fails to cite applicable law creating a right for it to recover attorney fees. Moreover, it has not prevailed in this appeal. We deny its request.

Conclusion

Ramirez's discrimination claims were improperly dismissed since Ramirez

³³ See Parker v. United Airlines, Inc., 32 Wn. App. 722, 725-26, 649 P.2d 181 (1982) (holding that an employee manual which made no reference to termination at will and stated that employees "may" be discharged for cause, in addition to employer's statement that "you will be treated fairly," did not give rise to an implied contract that employee would be discharged only for cause); Thompson, 102 Wn.2d at 224 (ruling that a policy guide stating that terminations would be handled in a "fair" and "just" manner was insufficient to establish an implied contract).

established a prima facie case of discrimination and WCPC failed to produce evidence that it terminated Ramirez for a legitimate, nondiscriminatory reason. The dismissal of Ramirez's negligent misrepresentation claim was also error since Ramirez raised a genuine issue of material fact as to whether WCPC affirmatively misrepresented workplace conditions in recruiting her. But the trial court properly dismissed Ramirez's breach of contract claim because Ramirez does not establish that WCPC modified her at-will employment status.

Reversed and remanded.

WE CONCUR:

Schindler, CT

Leach, J.

Grosse, J